No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MURPHY BROS., INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DEBORAH ALLEY SMITH
Counsel of Record

RHONDA PITTS CHAMBERS
RIVES & PETERSON
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

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QUESTION PRESENTED

Whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins to run prior to service of process when a named defendant receives a copy of the complaint by any means and from any source.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the court of appeals are reflected in the caption of the case.

RULE 29.1 LISTING

Petitioner, Murphy Bros., Inc., has no parent corporation nor any non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Murphy Bros., Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. A-1 - A-6) is reported at *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396 (11th Cir. 1997). The opinion of the United States District Court for the Northern District of Alabama (App. A-8 - A-10) is unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on October 24, 1997. (App. A-1). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on February 23, 1998. (App. A-11 - A-12). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, section 1446(b) provides, in pertinent part:

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

STATEMENT OF THE CASE

Michetti Pipe Stringing, Inc. ("Michetti") filed this suit in the Circuit Court of Jefferson County, Alabama on January 26,

1996, seeking damages for breach of contract and fraud against Murphy Bros., Inc. ("Murphy"). The case arises out of a dispute over payment for additional work allegedly performed by Michetti pursuant to a construction contract with Murphy.

A. The Negotiations

For many weeks prior to the filing of this suit, the parties had engaged in conversations and discussions attempting to resolve their dispute. These conversations and discussions were conducted between Murphy's Vice President - Risk Manager, Rick Moskowitz, and counsel for Michetti, J. David Pugh, Esq.

On January 29, 1996, in the midst of the negotiations, counsel for Michetti sent a letter, via facsimile transmission, to Rick Moskowitz and attached a "courtesy copy" of the complaint Michetti had filed on January 26, 1996 in the Circuit Court of Jefferson County, Alabama. The letter advised Moskowitz that Michetti had filed the complaint, but asked that he "[p]lease understand that Michetti had no other choice but to take this step to preserve all of its rights and remedies." Counsel stated that "Michetti would like to continue to explore the possibilities of resolving this matter without continuing the litigation." Counsel continued: "Accordingly, we are providing a courtesy [copy] of the complaint to you, and we hope to hear from you soon to discuss ways of settling this matter." [R1-5-Ex. A]. The parties continued their negotiations until February 12, 1996, when Murphy was served with process and refused to negotiate further.

B. Proceedings Below

Service of process was perfected on Murphy via certified mail on February 12, 1996. [R1-6-1]. On March 13, 1996, Murphy removed the action to the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 1441. [R1-6-1]. The jurisdiction of the district court was invoked

under 28 U.S.C. § 1332 based on diversity of citizenship, Michetti being a Canadian company with its principal place of business in Nisku, Alberta, Canada and Murphy being an Illinois corporation with its principal place of business in East Moline, Illinois.

On April 3, 1996, Michetti moved to remand the case to state court. Michetti argued that pursuant to the plain meaning of 28 U.S.C. § 1446(b) the time for removal begins to run from the defendant's "receipt ... through service or otherwise" of a copy of the complaint and that the removal was untimely because it was not filed within thirty days after Murphy received the courtesy copy of the complaint via facsimile. [R1-5-1].

The district court denied the motion to remand, concluding that the removal period commenced when Murphy was served with process. (App. A-7) The court agreed with *City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995), quoting:

> The 1949 addition [to section 1446(b)] supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served [a]long with the summons (Ala. R. Civ. P. 4).

(App. A-10). The district court determined that the removal was timely because it was filed within thirty days after service of process. (App. A-7).

The district court granted Michetti's motion to certify the issue for interlocutory appeal to the United States Court of

Appeals for the Eleventh Circuit in an order dated May 1, 1996. (App. A-13 - A-14). That certification was renewed on September 17, 1996. (App. A-15 - A-16). The court of appeals granted Michetti's petition for permission to appeal under 28 U.S.C. § 1292(b) by order dated December 5, 1996. (App. A-17).

On October 24, 1997, the court of appeals reversed the district court. *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396 (11th Cir. 1997). The court of appeals rejected the district court's conclusion that the "or otherwise" language of the statute was not intended to have any effect in states where a copy of the complaint must be delivered when service of process is effected, finding that the meaning of the statute was clear. The court stated:

> An interpretation that started the clock running before the complaint landed in the defendant's hands could "thwart the obvious purpose" of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that "[i]t is believed that this will meet the varying conditions of practice in all the States." And the stated intent for the 1948 amendments was to make practice identical from state to state; making other states different from New York thwarts that intention. So the plain meaning stands.

(App. A-5). The court concluded that "the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means." (App. A-3) The court held that the time period for removal in this case commenced

when the faxed, courtesy copy of the complaint was received by Mr. Moskowitz on January 29, 1996, and that the notice of removal, filed forty-four days later, was untimely. (App. A-3). The court reversed and remanded the case with instructions to the district court to remand the action to state court. (App. A-6).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Results in a Departure from the Accepted and Usual Course of Judicial Proceedings.

The "receipt rule"[1] adopted by the court of appeals in this case results in a radical departure from the accepted and usual course of judicial proceedings. Historically, service of process has been understood to be the procedural event that allows the court to exercise personal jurisdiction over a defendant and which triggers the defendant's obligation to take action in response to the allegations of the complaint. Consequently, a party named as a defendant need take no action in response to a complaint until he has been joined as a party defendant by service of process. His liabilities cannot be determined, nor his rights prejudiced before he has been served. The receipt rule runs counter to these accepted principles.

Under the receipt rule, if a party named as a defendant "receives" a copy of the complaint, by any means and from any source, he must remove the case within 30 days or forever lose his right to a federal forum. This is true regardless of whether service of process has been perfected, or even attempted, at the time the complaint is "received" or whether service ever could

[1] The conflicting views expressed in the two lines of cases that have developed on this issue have come to be known as the "receipt rule" and the "service rule." The "receipt rule" cases hold that the removal period runs from the date the named defendant receives a copy of the complaint, from whatever source, regardless of whether service of process has then been perfected. The "service rule" cases, by contrast, hold that the time period for removal does not begin to run from receipt of the complaint if receipt occurs prior to service of process (or stated another way, that service of process is a necessary prerequisite to the commencement of the time period for removal). Compare *Tyler v. Prudential Insurance Co.*, 524 F. Supp. 1211, 1214 (W.D. Pa. 1981)(receipt rule) with *Love v. State Farm Mutual Automobile Ins. Co*, 542 F.Supp. 65 (N.D. Ga. 1982)(service rule).

be perfected. Whether the party received the complaint via facsimile as a "courtesy" from plaintiff's counsel, as in this case, or he stumbled upon it lying in the gutter outside the courthouse, the receipt rule requires that he remove within 30 days or lose his right to do so. Thus, contrary to the accepted and usual course of proceedings, whereby a defendant need not take any action prior to service in order to protect his rights, applying the receipt rule, a named defendant who receives a copy of the complaint must take action prior to service to preserve his rights. His rights can be prejudiced -- he can forever lose his right to remove -- even prior to the time he is made a party defendant by service of process.[2]

The lower courts have struggled with this issue, and a clear split of authority exists in the district courts.[3] Appellate review

[2] The receipt rule also allows plaintiffs, by providing a "courtesy" copy of the complaint to defendants prior to service, to try to trap unwary defendants into waiving their right to remove. See, e.g. *Carter v. Building Material and Construction Teamsters' Union Local 216*, 928 F.Supp. 997 (N.D. Cal. 1996)("courtesy" copy sent on November 17, 1995 with request for settlement discussions; service perfected February 26, 1996; March 18, 1996 removal held untimely under receipt rule). "[T]he Federal courts should not sanction devices intended to prevent a removal to Federal court where one has that right, and should be equally vigilant to protect the right to proceed in Federal court as to permit the state courts in proper cases to retain their own jurisdiction." *Wecker v. Nat'l Enameling and Stamping Co.*, 204 U.S. 176, 186 (1907).

[3] See, e.g., *Kelly v. Dolgen Corp., Inc.*, 972 F. Supp. 1470 (M.D. Ga. 1997)(service rule); *Higgins v. Kentucky Fried Chicken*, 953 F. Supp. 266 (W.D. Wis. 1997)(receipt rule); *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D. S.C. 1996)(service rule); *Speilman v. Standard Insurance Company*, 932 F. Supp. 246 (N.D. Cal. 1996)(receipt rule); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284 (W.D. Mo. 1996) (service rule); *City National Bank of Sylacauga v. Group Data Services*, 908 F.Supp 896 (N.D. Ala. 1995)(service rule); *Gates Construction Corp. v. Koschak*, 792 F. Supp. 334 (S.D.N.Y. 1992)(receipt rule); *Barratt v. Phoenix Mutual Life Insurance Co.*, 787 F. Supp. 333 (W.D.N.Y. 1992)(service rule); *Pillin's Place, Inc. v.*

(Footnote 3 continued on next page)

of this issue is rare because of the procedural roadblocks to review of removal issues. The decision of a district court to remand a case as untimely removed is "not reviewable on appeal or otherwise." *See* 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). The standards for obtaining interlocutory review under 28 U.S.C. § 1292(b) are stringent. As a result of these roadblocks to securing appellate review, trial courts rarely obtain guidance from the courts of appeals on this issue. In fact, since section 1446(b) was amended almost 50 years ago to add the receipt-by-service-or-otherwise language at issue herein, only three other appellate courts have addressed the issue, and all of those cases have been decided in the last five years. See *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839 (5th Cir. 1996); *Roe v. O'Donohue*, 38 F.3d 298 (7th Cir. 1994); *Tech Hills II Assocs v. Phoenix Home Life Mut. Insurance Co.*, 5 F.3d 963 (6th Cir. 1993). The opportunities for this Court to review the issue are even rarer. Indeed, this is the first time this Court has been asked to consider this issue.[4] Consequently, the Court should seize the opportunity presented by this case to review this issue and exercise its supervisory jurisdiction in order to provide much needed guidance to the lower courts on this issue.

(Footnote 3 continued)

Bank One, Akron, N.A., 771 F. Supp. 205 (N.D. Ohio 1991)(receipt rule); *Bennett v. Allstate Ins. Co.*, 753 F. Supp. 299 (N.D. Cal. 1990)(service rule); *North Jersey Savings & Loan Association v. Fidelity and Deposit Co. of Maryland*, 125 F.R.D. 96 (D.N.J. 1988)(receipt rule); *Valentine Sugars, Inc. v. Phillips Petroleum Co.*, 1989 U.S.Dist. LEXIS 16028 (E.D. La. 1990)(service rule); *Love v. State Farm Mutual Automobile Ins. Co*, 542 F.Supp. 65 (N.D. Ga. 1982)(service rule); *Quick Erectors, Inc. v. Seattle Bronze Corp.*, 524 F. Supp. 351 (E.D. Mo. 1981)(service rule); *Tyler v. Prudential Insurance Co.*, 524 F. Supp. 1211, (W.D. Pa. 1981)(receipt rule).

[4] Review was not sought in this Court from any of the three other court of appeals' decisions addressing this issue.

II. The Decision of the Court of Appeals is Erroneous.

As the court of appeals accurately found, the plain meaning of a statute is conclusive except in the rare cases in which the "'literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571(1982)). However, if the language of 28 U.S.C. § 1446(b) had a clear or plain meaning, as the court of appeals found, there would not be such a clear split of authority among the lower courts as to its meaning. See *supra*, n.2; *infra*, n.13. To conclude that the statute has a plain meaning requires "the narrowest of vision; the statutory language must be taken outside the context of the surrounding statute and the other removal statutes; the language must be analyzed apart from the legislative and case law history; and definitions of terms must not be questioned."[5] The statute's meaning cannot be ascertained in a vacuum[6]

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[5] Donna Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359, 370 (Winter 1992). See also *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377, 1379 (S.D.Ala. 1990)("the words 'or otherwise' are so vague as to have no meaning")

[6] See *United States v. Thompson/Center Arms Co*, 504 U.S. 505, 516 n.8 (1992)("'A statute like any other living organism, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. ... The meaning of such a statute cannot be gained by confining inquiry within its four corners.")(quoting *United States v. Monia*, 317 U.S. 424, 432 (1943)(dissenting opinion)); *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) ("'It is well settled that in interpreting a statute, the court will look not merely to a particular clause in which the general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law...")(quoting *Brown v. Duchesne*, 19 How. 183 (1857)).

A. The court of appeals' interpretation of 28 U.S.C. § 1446(b) is not consistent with the legislative history of the statute or with the purpose of the 1949 amendment.

Prior to 1948, the time period for removal varied from state to state because it was tied to the time for responding to the complaint under state law. Concern for uniformity in the time period allowed for removal precipitated the 1948 amendment to section 1446(b) which required that removal take place within twenty days "after commencement of the action or service of process, whichever is later." 16 MOORE'S FEDERAL PRACTICE ¶ 107 App.01[1] (3d ed.). However, the 1948 amendment created inequities also. In states like New York where a case could be commenced by serving the defendant with a summons without filing or serving a complaint, the removal period could expire before the defendant even received a copy of the complaint from which he could determine whether the case was removable.

The 1949 amendment sought to correct these inequities by amending the statute to require removal within twenty days of defendant's receipt, by service or otherwise, of the initial pleading. The 1949 amendment implemented a minor change that was intended merely to toll the time for removal in those jurisdictions where the defendant did not have access to the complaint when he was served, in order to assure defendants in those jurisdictions the same twenty day time period to remove that defendants were afforded in other jurisdictions.[7] Nothing in the legislative history indicates that Congress intended this amendment to dispense

[7] The 1949 amendment included an alternative time period for removal. That alternative time period was added to deal with anticipated problems in jurisdictions where a suit could be commenced by filing a complaint, but service of process could be perfected simply by serving a summons alone. Committee Note to 1949 Amendments, reprinted in 16 MOORE'S FEDERAL PRACTICE ¶ 107 App. 02[2] (3d ed.).

with the need for service of process -- which had always been required before a defendant was obligated to exercise his right to remove.

The discussion of the legislative history of the statute contained in the Eleventh Circuit's opinion in this case reflects that the court misapprehended the real issue. The issue is *not* whether receipt replaced service of process as the event triggering the removal period throughout the country or only in New York. See (App. A-5). The issue is whether the adoption of the 1949 amendment abrogated service of process as a necessary prerequisite to the commencement of the removal period. In other words, was the amended statute intended to require both service and receipt. The court of appeals observes that making other states different from New York thwarts Congress's intent to make practice uniform. (App. A-5). To the contrary, retaining service of process as a prerequisite to removal does not make New York *different* from other states. It simply provides for uniformity on two levels -- service of process and receipt of the complaint -- both of which must occur to trigger the removal period. In most jurisdictions service and receipt occur simultaneously, but both are required in all jurisdictions. The historical context and legislative history demonstrate that the service requirement is inherent in the statute.

B. The receipt rule conflicts with other removal statutes.

Section 1441 (b) of the removal statutes provides that "any other such action shall be removable only if *none of the parties in interest properly joined and served as defendants* is a citizen of the state in which the action is brought." 28 U.S.C. § 1441(b) (emphasis supplied). According to this language, a "defendant" within the meaning of the removal statutes is "a party in interest [who has been] properly joined and served." Since the time period for removal does not begin to run until "receipt by the

defendant, through service or otherwise, of a copy of the initial pleading" and since a party is not a defendant until he has been properly joined and served, the time for removal cannot begin to run prior to service of process. Thus, the receipt rule cannot be the proper interpretation of section 1446(b).

Moreover, the interplay between section 1446(b) and section 1441(b) demonstrates that the receipt rule is at odds with Congress's intent. In determining whether a case is removable under 1441(b), only parties who are properly joined and served as defendants must be considered. However, in determining the time for removal under 1446(b) according to the receipt rule, all parties who have received a copy of the complaint must be considered. The majority view is that in suits naming multiple defendants, when the time period for removal begins to run for the first party, it begins to run for all the parties. See *Getty Oil Co. of Texas v. Ins. Co of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988); 16 MOORE'S FEDERAL PRACTICE ¶ 107.30[3][a][I] (3d ed.). But see *McKinney v. Bd of Trustees of Mayland Comm. College*, 955 F.2d 924, 926-28 (4th Cir. 1992). With the receipt rule in place, all defendants could lose their right to a federal forum based on the actions of a party who need not otherwise be considered in the removal equation.[8] Certainly, Congress did not intend this anomalous result. No such problems arise if service is required before the removal period commences.

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[8] For example, the plaintiff might provide one of several named defendants with a "courtesy copy" of his complaint and later perfect service on the other defendants. The unserved defendant need not join in the removal or be considered in determining removability, but his early receipt of the complaint commences the running of the removal period for all the defendants. All the defendants can be deemed to have waived their rights to a federal forum because of inaction on the part of a party who need not even be considered in determining whether the case is removable, nor join in the removal petition.

C. The receipt rule cannot be harmonized with the Federal Rules of Civil Procedure.

Rule 81(c), governing procedures after removal, contains the same language as section 1446(b), requiring that a defendant respond to the complaint

> within 20 days after *receipt through service or otherwise of a copy of the initial pleading...*, or within 20 days after the service of a summons on such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever is longer.

FED. R. CIV. P. 81(c) (emphasis supplied). This language was added to Rule 81(c) contemporaneously with the addition of this same language to section 1446(b) and for the expressed purpose of making Rule 81(c) consistent with section 1446(b).[9] Logic dictates that the language "receipt, by service or otherwise, of a copy of the initial pleading" was intended to mean the same thing in both the statute and the rule.[10] If mere receipt of the initial

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[9] The amendment to Rule 81(c) was effectuated shortly before the amendment to 28 U.S.C. § 1446(b). However, the Advisory Committee Notes to the proposed amendment to Rule 81(c) clearly show that the "service or otherwise" language was drawn directly from the proposed amendment to § 1446(b): "The need for revision of the third sentence of [Rule 81(c)] is occasioned by the procedure for removal set forth in revised title 28 U.S.C. § 1446 . . . The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment . . ." Committee Note of 1948 Advisory Committee's Proposed Amendment to Subdivision(c), reprinted in 7 MOORE'S FEDERAL PRACTICE ¶ 81.01 [18] (2d ed. 1992).

[10] In *Roe v. O'Donohue*, 38 F.3d 298 (7th Cir. 1994), the Seventh Circuit adopted the receipt rule based on the "plain meaning" of § 1446(b) without even considering the identical language in Rule 81(c). A year later the court was called upon to ascertain the meaning of the same language in Rule 81(c). *Silva v. City of Madison*, 69 F.3d 1368 (7th Cir. 1995), *cert. denied*, 134 L.Ed.2d 522 (1996). The court refused to hold that that same language in the Rule, which was adopted at the same time and for the purpose of consistency,

(Footnote 10 continued on next page)

pleading is the proper interpretation of this language, as the court of appeals held, then a named defendant can be required to remove a case and to respond to the complaint without ever having been served with process pursuant to either state or federal law. Abrogation of the requirement of service of process, even if only in a limited number of cases, would be a profound change in procedure. Adoption of the receipt rule interpretation of the relevant language dictates the conclusion that such a profound procedural change was made without even a passing note or comment in the legislative history of the statute, the Supreme Court recommendation on adoption of the rule or the advisory committee comments to Rule 81(c). The absence of any such note or comment is a clear indication that the "receipt rule" interpretation of the operative language in 1446 (b) is not what was intended.[11]

Footnote 10 continued)

means mere receipt (as it had held with the statute). Rather, it found that service of process is required notwithstanding the receipt-by-service-or-otherwise language of the Rule. *Id.* at 1375 ("we perceive nothing in the statute, the rule or their respective legislative histories that would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process"). It is nonsensical to hold that language added to a statute and a rule in the same time period and for the purpose of consistency between the two was not intended to have the same meaning in each.

[11] See *Apache Nitrogen Products, Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 680 (D.Ariz. 1993)("Of course, it is conceivable that Congress might wish to establish a different standard, outside the boundaries of Rule 12, to govern response time in removed actions. It is unimaginable, however, that such a significant alteration in the Federal Rules of Civil Procedure would be effected without mention by the Advisory Committee, the Supreme Court, or Congress itself. And a careful examination of the legislative history of Rule 81(c) reveals not one iota of evidence that such a change ever was intended.")

The history and purpose of the 1949 amendment, the other removal statutes and the Rules indicate that service of process is a prerequisite to the commencement of the removal period. The requirement of service also provides a bright line test for determining the time for removal. In contrast, the receipt rule adopted by the Eleventh Circuit is inconsistent with the history and purpose of the statutory amendment and conflicts with the other removal statutes and the Rules. This Court should grant Murphy's petition to resolve the conflict among the lower courts and to correct the Eleventh Circuit's error.

III. The Question Presented is Important

This case presents an issue of exceptional importance to litigants and their counsel not heretofore considered by the Court. Virtually every time a potentially removable lawsuit is filed the defendants and their counsel must consider whether to seek removal and must confront the issue of determining when the notice of removal must be filed. The question presented in this case needs to be definitively resolved so that litigants and their counsel can determine with confidence what is required of them and to assure that defendants are not denied their right to a federal forum because of confusion in the law. (App. A-6) ("any unfairness to Murphy here results more from unsettled law, which prevented Murphy from being able to determine its removal deadline").

Although the four circuit courts that have considered the issue have all adopted a receipt rule,[12] the district courts in the other

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[12] As noted above, the reasoning of the Seventh Circuit in *Silva v. City of Madison*, 69 F.3d 1368 (7th Cir. 1995), *cert. denied*, 134 L.Ed.2d 522 (1996) is fundamentally inconsistent with its reasoning in *Roe*, and it remains to be seen how this inconsistency will be resolved. Moreover, although the Sixth Circuit purported to adopt the receipt rule, it equated receipt to service by holding that the defendant received the complaint when it came into the hands of an agent authorized to accept service on behalf of the corporate defendant, which was at the time of service. See *Tech Hills*, 5 F.3d at 968.

circuits remain hopelessly divided on the issue.[13] Commentators likewise disagree.[14] Because of procedural bars to review of orders addressing this issue, another opportunity for this Court to provide a definitive interpretation of the statute is not likely to arise soon. "Nothing is more wasteful than litigation about where to litigate," *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting), and such litigation will continue to proliferate until this Court addresses the issue. As a result of the uncertainty in the law, defendants who have a right to a federal forum will continue to be denied that right either because the lower courts erroneously calculate the removal time based upon the receipt rule or because the defendants incorrectly calculate their removal time based on the service rule. This Court should resolve the uncertainty created by the conflicting interpretations of the statute.

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[13] See, e.g., *Joiner v. Kaywal Transportation, Inc.*, 979 F. Supp. 1252 (W.D.Ark. 1997)(receipt rule); *Boyles v. Junction City Foundry, Inc.*, 1997 U.S.Dist.LEXIS 21876 (D.Kan. 1997)(receipt rule); *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329 (D.S.C. 1996)(service rule); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284 (W.D.Mo 1996)(service rule); *Speilman v. Standard Ins. Co.*, 932 F. Supp. 246 (N.D.Cal. 1996)(receipt rule); *Colegio de Ingenieros Y Agrimensores De Puerto Rico v. CNE Consulting, Inc.*, 896 F. Supp. 241 (D.P.R. 1995) (receipt rule); *Kluksdahl v. Muro Pharmaceutical, Inc.*, 886 F.Supp. 535 (E.D.Va. 1995)(receipt rule); *Apache Nitrogen Products, Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674 (D.Ariz. 1993)(service rule); *Baratt v. Phoenix Mutual Life Ins. Co.*, 787 F. Supp. 333 (W.D.N.Y. 1992)(service rule); *Gates Construction Corp. v. Kochak*, 792 F.Supp. 334 (S.D.N.Y. 1992)(receipt rule); *Greensmith Co. v. Bearden*, 796 F.Supp. 812 (D.N.J. 1992, receipt); *Hill v. City of Boston*, 706 F. Supp. 966 (D.Mass. 1989)(service rule).

[14] Compare Donna Rohwer, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(B)*, 61 UMKC L. Rev. 359 (Winter 1992) with Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 Md.L.Rev. 374 (Winter 1993).

In summary, the decisions of the lower courts are in substantial conflict over the proper interpretation of 28 U.S.C. § 1446(b). The interpretation adopted by the court of appeals in this case is contrary to the legislative history and purpose of the statute and cannot be reconciled with the other removal statutes or with the Rules of Civil Procedure. This case presents a rare opportunity for the Court to address this issue of widespread importance and to bring much needed uniformity to this area.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DEBORAH ALLEY SMITH
Counsel of Record

RHONDA PITTS CHAMBERS

RIVES & PETERSON
A Professional Corporation
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Deborah Alley Smith, a member of the Bar of this Court, hereby certify that on this ____ day of May, 1998, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following:

J. David Pugh, Esq.
James F. Archibald, III, Esq.
Bradley, Arant, Rose & White LLP
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

Counsel for Respondent

I further certify that all parties required to be served have been served.

DEBORAH ALLEY SMITH
1700 Financial Center
505 North 20th Street
Birmingham, Alabama 35203
(205) 328-8141

Counsel for Petitioner

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 96-7150

MICHETTI PIPE STRINGING, INC., a corporation
Plaintiff-Appellant,

v.

MURPHY BROTHERS, INC., a corporation
Defendant-Appellee

Oct. 24, 1997

Appeal from the United States District Court
for the Northern District of Alabama
(No. 96-CV-673-JFG), J. Foy Guin, Jr., Judge

Before COX and BARKETT, Circuit Judges, and HUNT[*], District Judge.

COX, Circuit Judge:

This interlocutory appeal presents a single issue: whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins when the defendant receives a copy of the plaintiff's initial pleading, or when the defendant is served with a copy of that pleading. Concluding that the clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading, we reverse.

Background

Michetti Pipe Stringing, Inc. sued Murphy Bros., Inc. in Alabama state court. Within a few days of filing suit, Michetti's

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*Honorable Willis B. Hunt, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

counsel faxed a file-stamped copy of the complaint with a cover letter to Murphy's vice president for risk management. Murphy replied to the letter and acknowledged receipt of the complaint. Two weeks later, Michetti formally served Murphy by certified mail.

Murphy filed a notice of removal under 28 U.S.C. §1446(a) thirty days after the complaint had been served—but forty-four days after receiving the facsimile copy. Michetti moved the district court to remand the case to state court on the ground that the notice of removal was untimely. Citing district court precendent from Alabama and elsewhere in this circuit, the court denied the motion, but certified the order for interlocutory appeal, identifying the key question to be whether 28 U.S.C. §1446(b) embodies a "receipt rule" or a "service of process rule."

This court granted Michetti's petition for permission to appeal under 28 U.S.C. § 1292(b). Michetti now invites us to follow the statute's plain language and hold that § 1446(b)'s thirty-day period runs from the defendant's receipt of the complaint. Murphy, on the other hand, points to both legislative history and fairness concerns in asking for a rule that the thirty-day clock starts to tick upon service. Murphy proposes that service for this purpose need not mean service that complies with state procedures, as long as the plaintiff intended it as service.[1] Because the question here is purely one of law, we review de novo the district court's denial of the motion to remand.[2]

Discussion

Section 1446, which governs the procedure for removal of a case from state to federal court, limits the period in which a defendant may exercise his removal right:

[1](Appellee's Br. at 6.)

[2]See Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863, 865 (11th Cir. 1997).

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .[3]

By and large, our analysis begins and ends with the three italicized words. The statute uses the word "receipt," not "service," to describe the action that starts the thirty-day clock. "Receipt" is the nominal form of "receive," which means broadly "to come into possession of" or to "acquire."[4] Attached to "receipt," the phrase "through service or otherwise" opens a universe of means besides service for putting the defendant in possession of the complaint. Limiting the triggering event to "service," on the other hand, would violate these words' broad meaning by trimming that universe down to a narrow spectrum of methods.

If a statute is clear, it means what it says.[5] We therefore join the other circuit courts that have confronted the issue and hold that the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means.[6] Here, the countdown began the day after the arrival of the faxed, file-stamped copy of the complaint in the hands of a responsible Murphy employee. The notice of removal came forty-four days later and was therefore untimely.

[3]28 U.S.C. § 1446(b) (1994) (emphasis added).

[4]Webster's Third New International Dictionary 1894 (1986).

[5]See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989).

[6]See Reece v. Wal-Mart Stores, Inc., 98 F.3d 839, 841 (5th Cir. 1996); Roe v. O'Donohue, 38 F.3d 298, 303 (7th Cir. 1994); Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963, 968 (6th Cir. 1993).

The statute's clarity notwithstanding, two of Murphy's contentions merit further discussion. First, Murphy argues that this plain meaning contravenes the congressional intent reflected in the legislative history. It is true that "[i]n rare and exceptional circumstances, we may decline to follow the plain meaning of a statute because overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text's plain meaning."[7] But the phrase "receipt . . . or otherwise," as interpreted here, is not contrary to—or "demonstrably at odds" with, as the Supreme Court has put it[8]—the intent Murphy divines from the legislative history.

That history is as follows: before 1948, a defendant could remove a case at any time when, under state procedure, he could file a responsive pleading.[9] To homogenize practice from state to state, in 1948 Congress amended § 1446 to add a twenty-day (later thirty) deadline that ran from service of process.[10] A problem arose, however, in states such as New York where service of process could precede filing and service of the complaint. In these states, a defendant's removal time could expire before he saw the complaint and knew whether it contained a removable claim.[11] In 1949, Congress amended § 1446 to the present "by receipt . . . or otherwise" language in order to

[7]Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 238 (11th Cir. 1995) (citing Hallstrom v. Tillamook Co., 493 U.S. 20, 28-30, 110 S.Ct. 304, 310, 107 L.Ed.2d 237 (1989)); see Demarest v. Manspeaker, 498 U.S. 184, 190, 111, S.Ct. 599, 604, 112 L.Ed.2d 608 (1991).

[8]Demarest, 498 U.S. at 190, 111 S.Ct. at 604 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982).)

[9]Tech Hills II, 5 F.3d at 967.

[10]Act of June 25, 1948, ch. 646, § 1446(b), 62 Stat. 869, 939 (1948).

[11]Robert P. Faulkner, The Courtesy Copy Trap, 52 Md. L.Rev. 374, 393-94 (1993).

eliminate this problem.[12] From this history, Murphy argues that the "receipt . . . or otherwise" language was not meant to have any effect outside of states like New York. Therefore, Murphy concludes, only in New York did receipt replace service as the triggering event.

The legislative history does not lead to that result. There were undoubtedly narrower ways of solving the New York problem than changing the triggering event from service to receipt. That does not mean, however, that the result in this case is necessarily "at odds" with what Congress meant to do. An at-odds reading "thwart[s] the obvious purpose of the statute."[13] An interpretation that started the clock running before the complaint landed in the defendant's hands could "thwart the obvious purpose" of the New York amendment, but today's reading does not do that. Rather, it puts defendants in other states on the same footing as those in New York: they have thirty days to remove after they see the filed complaint. It does not thwart Congress's intent to apply the amendment nationwide unless Congress indicated an intent to limit it to New York and like states. The indication is in fact to the contrary: the Senate report accompanying the amendment states that "[i]t is believed that this will meet the varying conditions of practice in all the States."[14] And the stated intent for the 1948 amendments was to make practice identical from state to state;[15] making other states different from New York thwarts that intention. So the plain meaning stands.

[12]Act of May 24, 1949, ch. 139, § 83(a), 63 Stat. 88, 101 (1949); see H.R.Rep. No. 81-352 (1949), reprinted in 1949 U.S.C.C.A.N. 1254, 1268.

[13]Commissioner v. Brown, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965).

[14]S.Rep. No. 81-303 (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1254 (emphasis added).

[15]See H.R.Rep. No. 80-308 (1948), reprinted in 1948 U.S.C.C.A.N. spec. pamphlet at A135-36.

Murphy's second contention is that a receipt rule invites abuse by perfidious plaintiff's counsel, who will, Murphy claims, set "courtesy copy traps" for unwary defendants—in extreme cases eliminating the right to remove by sending unfiled draft complaints thirty days before filing them. The short answer is that no such abuse has occurred here; Michetti faxed a file-stamped copy of the complaint to a Murphy employee who knew enough to see that a response followed. Any unfairness to Murphy here results more from unsettled law, which prevented Murphy from being able to determine its removal deadline, than Michetti's cunning.

The question of discouraging unjust tactics can thus be safely set "aside for consideration on a rainy day."[16] In any event, it appears unlikely that a plaintiff could eliminate the right to remove altogether by sending a draft complaint thirty days before filing it—until it is filed, a draft complaint is not the "initial pleading setting forth the claim for relief upon which such action . . . is based" that the defendant must receive to start the thirty-day clock.[17]

Conclusion

The district court's denial of the motion to remand is reversed and the action is remanded with instruction to the district court to remand the action to the Tenth Judicial Circuit of Alabama.

REVERSED and REMANDED WITH INSTRUCTION.

[16]Roe v. O'Donohue, 38 F.3d 298, 304 (7th Cir. 1994).

[17]28 U.S.C. § 1446(b).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

Michetti Pipe Stringing, Inc.,
a corporation,
Plaintiff,

v.

Murphy Brothers, Inc.,
a corporation,
Defendant.

[Entered: April 19, 1996]

ORDER

This cause came before the court at its regularly scheduled motion docket of this date on the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama. Having considered the motion, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion that the motion should be denied, the removal having been timely filed consistent with the meaning of 28 U.S.C.A. §1446(b). Accordingly, consistent with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of plaintiff to remand the case to the Tenth Judicial Circuit of Alabama be and it hereby is DENIED.

DONE and ORDERED this 19th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 96-G-0673-S

Michetti Pipe Stringing, Inc.,
a corporation,
Plaintiff,

v.

Murphy Brothers, Inc.,
a corporation,
Defendant.

[Entered: April 19, 1996]

MEMORANDUM OPINION

The parties in the above-styled action agree on the facts. Suit was filed in the Tenth Judicial Circuit of Alabama on January 26, 1996. Defendant Murphy Brothers, Inc. [hereinafter Murphy] received a copy of the complaint on January 29, 1996, by facsimile. By letter of January 30, 1996, Murphy acknowledged receipt of the complaint, but Murphy did not file its notice of removal until March 13, 1996 (44 days after the period for filing the notice of removal began to run). The complaint was served on the defendant by certified mail on February 12, 1996.

At issue is whether the removal language of 28 U.S.C.A § 1446(b), which follows, is to be interrupted as beginning to run when receipt of the complaint was known (January 29, 1996) or when the summons and complaint were served (February 12, 1996):

> The notice of removal of a civil action or proceeding shall be filed within 30 days after **the receipt** by the defendant, through service **or otherwise**, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . (emphasis added).

Plaintiff has argued that the time for removal runs from knowledge of the proceedings, not the service of process. Were it not so Congress would not have inserted the words "after the receipt by the defendant, through service or otherwise." The Eleventh Circuit has not addressed the question of whether the language of the statute should be interrupted as the "Proper Service Rule" or the "Receipt Rule." The Sixth and Seventh Circuit Courts of Appeal have adopted the "Receipt Rule." *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) ("[T]he 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service.'"); *Tech Hills II Associates v. Phoenix Home Life Mutual Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) ("The removal period is commenced when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim."). Both courts of appeal concluded that the "Proper Service Rule" cannot be reconciled with the wording of the statute.

In *The City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995), Judge Hancock applied the "Service Rule," as did Judge Howard in *Marion Corp. v. Lloyds Bank, PLC*, 738 F. Supp. 1377 (S.D. Ala. 1990). In denying the motion to remand Judge Hancock referred to *Marion* and *Love v. State Farm Mutual Automobile Insurance Company*, 542 F. Supp. 65 (N.D. Ga. 1982). Judge Hancock noted that a study of the congressional history surrounding 28 U.S.C. § 1446 indicates that the language relied on by the plaintiffs (28 U.S.C. § 1446(b)) was added to the statute in 1949 to correct a problem created by the 1948 revision of the statute.[1]

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[1]In 1949 Congress did not anticipate use of facsmile transmissions.

In discussing the applicability of the statute in Alabama, Judge Hancock said the following:

> The 1949 addition supplied the words "or otherwise" so as to provide for removal in states where an action is commenced merely by the service of a summons and there is no requirement that the initial pleading setting forth the claim for relief be served or filed until later. The language relied upon by plaintiff in § 1446(b) has no field of operation in states, such as Alabama, where the action is commenced by the filing of the complaint (Ala. R. Civ. P. 3) but a copy of that complaint must be served long with the summons (Ala. R. Civ. P. 4) (footnotes deleted).

This court agrees. Additionally, there could be problems in service upon a foreign state or political subdivision, agency, or instrumentality pursuant to 28 U.S.C. § 1608(a) which requires delivery of a copy of the summons and complaint in accordance with any special arrangements or an applicable international convention. In many instances service upon a foreign corporation takes much longer than 30 days. If the court were to adopt the "Receipt Rule," plaintiffs would be able to dodge the requirements of international treaties and trap foreign opponents into keeping their suits in state courts.

For the above-stated reasons the court holds that the motion to remand be denied.

An order consistent with this opinion is being entered contemporaneously herewith.

DONE and ORDERED this 19th day of April 1996.

/s/J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-7150

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff-Appellant,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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[Filed: Feb 23, 1998]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: COX AND BARKETT, Circuit Judges, and HUNT*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Cir-

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*Honorable Willis B. Hunt, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

cuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/E. R. Cox
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

ORDER

[Filed: May 1, 1996]

This cause came before the court on the motion of plaintiffs for certification on appeal. The court ruled in favor of defendant by order entered April 19, 1996, holding that the time for removal begins running from the date of service of the summons and complaint. This court is of the opinion that this order may involve a controlling question of law to which there is substantial ground for difference of opinion and an immediate appeal from that order may advance the ultimate determination of this litigation. Accordingly, pursuant to 28 U.S.C.A. § 1292(b), it is

ORDERED that this cause be and it hereby is CERTIFIED for appeal to the United States Court of Appeals for the Eleventh Circuit to consider the following question:

> Should the wording of 28 U.S.C.A.(b) which requires "notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant,

through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based" be interpreted as the "Proper Service Rule" or the "Receipt Rule?"

No trial of this case on the merits shall be conducted pending such appeal.

DONE and ORDERED this 30th day of April 1996.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 96-G-0673-S

MICHETTI PIPE STRINGING, INC.,
a corporation,
Plaintiff,

v.

MURPHY BROTHERS, INC.,
a corporation,
Defendant.

CERTIFICATION RENEWAL ORDER

[Filed: Sept. 17, 1996]

This cause came before the court on the motion of plaintiffs for recertification on appeal.[1] The court ruled in favor of defendant by order entered April 19, 1996, holding that the time for removal begins running from the date of service of the summons and complaint. This court still holds the opinion that this order may involve a controlling question of law to which there is substantial ground for difference of opinion and an immediate appeal from that order may advance the ultimate determination of this litigation. Accordingly, pursuant to 29 U.S.C.A. § 1292(b), it is

[1] Pursuant to Charles A. Wright, *Federal Practice and Procedure*, § 3929 (1977) (recertification is available if the district court remains persuaded the appeal would prove useful); *Borskey v. American Pad & Textile Co.*, 296 F.2d 894, 895 (5th Cir. 1961 (Although the circuit court lacked power to act on a petition not filed within the required ten days, the district court had power to reexamine its decision and to certify its action on such reconsideration for interlocutory appeal).

ORDERED that this cause be and it hereby is RECERTIFIED for appeal to the United States Court of Appeals for the Eleventh Circuit to consider the following question:

> Should the wording of 28 U.S.C.A.(b) which requires "notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based" be interpreted as the "Proper Service Rule" or the "Receipt Rule?"

No trial of this case on the merits shall be conducted pending such appeal.

DONE and ORDERED this 17th day of September 1996.

/s/ J. Foy Guin, Jr.
UNITED STATES
DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-1192

MICHETTI PIPE STRINGING, INC.,
a corporation,
Petitioner,

versus

MURPHY BROTHERS, INC.,
a corporation,
Respondent.

[Filed: Dec. 5, 1996]

On Petition for Permission to Appeal an Interlocutory Order
Pursuant to 28 U.S.C. 1292(b)

BEFORE: ANDERSON, DUBINA and BARKETT, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. §1292(b) is GRANTED.